

**Flanes Modier and Union General De Trabajadores.**  
Case 24-CA-4401

June 24, 1981

**DECISION AND ORDER**

Upon a charge filed on November 6, 1980, by Union General de Trabajadores, herein called the Union, and duly served on Flanes Modier, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 24, issued a complaint and notice of hearing on December 22, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3), (5), and (1) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing were duly served on the parties to this proceeding.

Respondent failed to file an answer to the complaint or request an extension of time for filing an answer.

On January 29, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment for failure to file an answer with exhibits attached. On February 5, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Subsequently, on February 5, 1981, Respondent requested that the Board grant a 15-day extension of time for filing an answer. Such request was granted by the Board on February 19, 1981, and the time for filing an answer was extended to March 6, 1981. Despite the Board's extension of time for filing an answer, Respondent has not filed an answer or response. The allegations of the Motion for Summary Judgment thus stand uncontroverted.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Summary Judgment**

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in the answer

filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing issued on December 22, 1980, and duly served on Respondent and the Union, specifically states that unless an answer to the complaint is filed by Respondent within 10 days of service thereof "all of the allegations in the complaint shall be deemed to be admitted by it to be true and may be so found by the Board." Further, according to the uncontroverted allegations of the General Counsel's memorandum in support of the Motion for Summary Judgment, by letter dated September 19, 1980, and attached to the Motion for Summary Judgment, the Regional Director advised Respondent that, due to Respondent's failure to file an answer, counsel for the General Counsel would move for summary judgment. No answer has been received.

Good cause for failure to answer the complaint has not been shown. Under the rule set forth above, the allegations of the complaint are deemed admitted and are found to be true. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

**FINDINGS OF FACT**

**I. THE BUSINESS OF RESPONDENT**

Respondent is a corporation engaged in the business of the manufacture and sale, at wholesale, of custards and related products. Respondent maintains its place of business in the City of Guaynabo, Commonwealth of Puerto Rico. During the past calendar year, a representative period, Respondent in the course and conduct of its business, purchased and caused to be transported and delivered to its place of business goods and materials in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to it, and received from other enterprises located in the Commonwealth of Puerto Rico, each of which other enterprises had received said goods and materials in interstate commerce directly from points located outside the Commonwealth of Puerto Rico.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. THE LABOR ORGANIZATION INVOLVED

Union General de Trabajadores is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *The Representation Proceeding*

#### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees of Respondent, employed at its plant located in Guaynabo, Puerto Rico, exclusive of all other employees, guards, and all supervisors as defined in Section 2(11) of the Act.

#### 2. The certification

A majority of the employees of Respondent in said unit, in a secret-ballot election conducted on July 14, 1980, under the supervision of the Regional Director for Region 24, designated the Union as their representative for the purposes of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 22, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

### B. *Respondent's Refusal To Bargain and Discrimination*

On or about July 23, 1980, Respondent, without prior notification to or bargaining with the Union, unilaterally discontinued its historical practice of granting Constitution Day, July 25, as a paid local holiday to its employees. Respondent has at all times since refused to bargain with the Union over the discontinuance of said practice.

In protest against Respondent's refusal to bargain with the Union over the discontinuance of the Constitution Day paid holiday, on or about July 23, 1980, Respondent's employees initiated a strike. On or about July 31, 1980, and again on August 1 and 4, 1980, Respondent's employees, through their representative Manuel Perfecto, made an unconditional offer to Respondent to return to work and to their positions of employment.

At the time at which these unconditional offers to return to work were made, Respondent had not permanently replaced employees Ananias Tirado Aponte, Juan Ramon Sanchez, David Silva Correa, Julio Cruz Reyes, Jesus Cruz Reyes, Jose Luis

River Diaz, Richardo Vazquez Fontanez, Ismael Cosme Ortiz, Orlando Rodriguez, Misael Sanchez Tirando, Marcos Ocasio Rosario, Julio Rivera Diaz, Benigno Reyes Santos, and Cristino Cruz Otero. On or about August 7, 1980, several days after the employee's third unconditional offer to return to work, Respondent permanently replaced these above-named employees. Since the date of the permanent replacement of these employees, Respondent has failed and refused to reinstate, or offer to reinstate, these employees to their former or substantially equivalent positions of employment.

Commencing on or about September 23, 1980, and thereafter on September 30 and October 14, 1980, Respondent has refused to bargain collectively with the Union.

Accordingly, on the basis of the foregoing facts, we find that Respondent has, since on or about July 23, 1980, unilaterally and without prior notification discontinued its historical practice of granting July 25 (Constitution Day) as a paid local holiday to its employees and has thereafter refused to bargain with the Union over the discontinuance of said practice and since on or about July 23, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusals has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. We further find by such unilateral action and that by failing to reinstate, or offer to reinstate, the above-named employees, Respondent discriminated and is discriminating in regard to the hire, tenure, and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, and thus has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5), (3), and (1) of the Act,

we shall order that it cease and desist therefrom. We shall also order it to take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondent failed to afford the Union an opportunity to bargain over the elimination of Constitution Day (July 25) as a paid holiday, in violation of Section 8(a)(5), (3), and (1), and that Respondent has, since September 23, 1980, refused to bargain collectively with the Union. Accordingly, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Firestone Wire & Cable Co., a Division of Firestone Tire & Rubber Company*, 249 NLRB 218, 220 (1980).

We have further found that Respondent discriminated and is discriminating against the above-named employees in regard to the hire, tenure, and terms and conditions of employment, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1). Accordingly, we shall order that Respondent offer the above-named employees full and immediate reinstatement to their former positions or, if such positions have been abolished, to any substantially similar positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and discharging if necessary to their reinstatement any employees hired after the strikers' offer to return to work on July 31, 1980, and that Respondent make them whole for any loss of pay they may have suffered by reason of Respondent's discriminatory actions by payment to them of a sum equal to that which each would have received as wages from the date of their unconditional offer to return to work, until Respondent offers them reinstatement, less any net earnings for the interim period. Backpay, plus interest, is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB

289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>1</sup> Respondent shall make available to the Board, upon request, payroll and other records in order to facilitate checking the amounts of backpay due to the above-named employees and any other rights they might be entitled to receive.

The Board, on the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. Flanes Modier is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Union General de Trabajadores is a labor organization within the meaning of Section 2(5) of the Act.

3. A unit including all production and maintenance employees of Respondent, employed at its plant in Guaynabo, Puerto Rico, exclusive of all other employees, guards, and all supervisors as defined in Section 2(11) of the Act, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 22, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing on or about July 23, 1980, and at all times thereafter, to bargain collectively with the Union over the elimination of Constitution Day (July 25) as a paid holiday, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5), (3), and (1) of the Act.

6. By refusing to bargain collectively with the Union on September 23, 1980, and thereafter on September 30 and October 14, 1980, Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By failing and refusing on or about July 31, 1980, and again on August 1 and 4, 1980, to reinstate, or offer to reinstate, the following employees, Respondent has engaged in and is now engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act:

Ananias Tirado	Ismael Cosme Ortiz
Aponte	Orlando Rodriguez
Juan Ramon	Misael Sanchez Tirado
Sanchez	Marcos Ocasio Rosario
David Silva Correa	Julio Rivera Diaz

<sup>1</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based upon the formula therein set forth.

Samuel Centeno  
Rivera  
Julio Cruz Reyes  
Jose Luis Rivera  
Diaz

Benigno Reyes Santos  
Cristino Cruz Otero  
Jose Luis Reyes  
Richardo Vazquez  
Fontanez

Jose Luis Rivera  
Diaz

Richardo Vazquez  
Fontanez

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Flanes Modier, Guaynabo, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively with the Union over its decision to eliminate Constitution Day (July 25) as a paid holiday, and all other terms and conditions of employment of the employees in the aforesaid appropriate unit.

(b) Failing and refusing to reinstate, or offer to reinstate, the above-named employees to their former positions or, if such positions have been abolished, to any substantially similar positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Union General de Trabajadores with respect to the elimination of Constitution Day (July 25) as a paid holiday, and over any other terms or conditions of employment of the employees in the aforesaid appropriate unit, and to reduce to writing any agreement reached as result of such bargaining.

(b) Offer full and immediate reinstatement to the following employees and make them whole for any loss of pay they suffered by reason of Respondent's discrimination against them, in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

Ananias Tirado  
Aponte  
Juan Ramon  
Sanchez  
David Silva Correa  
Samuel Centeno  
Rivera  
Julio Cruz Reyes

Ismael Cosme Ortiz  
Orlando Rodriguez  
Misael Sanchez Tirado  
Marcos Ocasio Rosario  
Julio Rivera Diaz  
Benigno Reyes Santos  
Cristino Cruz Otero  
Jose Luis Reyes

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail an exact copy in English and in Spanish of the attached notice marked "Appendix"<sup>2</sup> to Union General de Trabajadores and to all the employees at its Guaynabo, Puerto Rico, plant. Copies of said notice in English and in Spanish, on forms provided by the Regional Director for Region 24, after being duly signed by Respondent's authorized representative, shall be mailed immediately upon receipt thereof, as herein directed, and posted by Respondent at its Guaynabo, Puerto Rico, plant immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>2</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Relations Board."

### APPENDIX

#### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice:

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT fail and refuse to bargain collectively with Union de Trabajadores concerning the elimination of Constitution Day (July 25) as a paid holiday or refuse to bargain collectively with the Union concerning any other terms and conditions of employment.

WE WILL NOT fail and refuse to reinstate the following employees to their former positions or, if such positions have been abolished, to any substantially similar positions, without prejudice to their seniority or any other rights and privileges previously enjoyed:

Ananias Tirado	Ismael Cosme Ortiz
Aponte	Orlando Rodriguez
Juan Ramon	Misael Sanchez Tirado
Sanchez	Marcos Ocasio Rosario
David Silva	Julio Rivera Diaz
Correa	Benigno Reyes Santos
Samuel Centeno	Cristino Cruz Otero
Rivera	Jose Luis Reyes

Julio Cruz Reyes    Richardo Vazquez  
Jose Luis Rivera    Fontanez  
Diaz

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain collectively with Union General de Trabajadores over the elimination of Constitution Day (July 25) as a paid holiday, or any other terms and conditions of employment.

WE WILL offer full and immediate reinstatement to the above-named employees to their former positions or, if such positions have been abolished, to any substantially similar positions, and make them whole for any loss of pay suffered as a result of our discrimination against them, plus interest.

FLANES MODIER